IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 281 of 1980

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHIBEN TULSIDAS

Versus

JAYANTILAL CHUNILAL

Appearance:

1. Civil Revision Application No. 281 of 1980

MS VASUBEN P SHAH for Petitioner No. 1-2

MS KJ BRAHMBHATT for Petitioner No. 2

MR SN SHELAT for Respondent No. 1

MR UNMESH D SHUKLA for Respondent No. 1

RULE SERVED for Respondent No. 2-6

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 18 /3/2005

C.A.V. JUDGEMENT

1. The petitioners-original defendant Nos. 1 and 2 have filed this Revision Application under Section 29(2)

of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act") against the judgement and decree dated 12.11.1979 passed by the District Judge, Surat, in Regular Civil Appeal No. 219 of 1978. The learned Judge by his impugned judgement was pleased to dismiss the appeal of the appellants-petitioners herein. The learned Judge was pleased to confirm the judgement and decree dated 26.10.1978 passed by the learned Judge, Small Causes Court at Surat in Rent Suit No. 1915 of 1975 (Old Regular Civil Suit No. 824 of 1974). It may be noted that the learned Judge by his judgement and decree has held that the defendants i.e. petitioner Nos. 1 and 2 herein and respondent Nos. 2, 3,4 and 6 in the Revision Application and original defendants shall hand-over vacant possession of the suit premises to the plaintiff within three months from the date of the judgement. The Court also fixed standard rent of the suit premises at Rs. 31.50 ps. per month. The Court also directed the defendants to pay arrears of rent from 6.11.1972 to 5.7.1976 and also mesne profit to the plaintiff at Rs. 31.50 ps. per month from the date of the suit till delivery of the possession.

2. The facts emerging from the record of the case which are relevant herein, are set out as under:-

2.1 There is a property situated at Navapura, Vachali Seri, Surat, bearing Municipal Ward No. 3, Nondh No. 3542 (hereinafter referred to as "the suit premises"). Jayantilal Chunilal, respondent No. 1 herein, original plaintiff, is the owner of the suit property. From the record it appears that the plaintiff had given the suit premises on lease at the rate of Rs. 31.50 ps. per month. The defendants were liable to pay education cess over and above the rent of the suit premises.

2.2 As the defendant failed and neglected to make payment of rent for 18 months at the rate of Rs. 31.50 ps. per month i.e. Rs. 567/- i.e. November, 1972 to 23.4.1974 and from 23.4.1974 to 30.4.1974 Rs. 8/- in all a sum of Rs. 575/-, the plaintiff was constrained to address a notice dated 9.5.1974 to the tenant Tulsidas Nathubhai through his advocate terminating the tenancy. He has stated that the defendant failed and neglected to pay the aforesaid amount of rent. The defendant also neglected to pay education cess. The defendant has also created nuisance. In view of the same, the said notice was addressed by the plaintiff to the defendant at Exh. 37 in the proceedings.

2.3 The defendant has replied to the said notice of the plaintiff vide letter dated 15.7.1974. In the reply to the said notice, the defendant has raised a dispute regarding standard rent and stated that the original rent was only Rs. 27/- and rent at the rate of Rs. 31.50 ps. was excessive. The defendant has also denied that he was in arrears of rent of Rs. 575/-. He has stated that he has not created any nuisance. He has raised a dispute of standard rent and prepared to pay the said amount. The defendant decided to send Rs. 638/- regarding arrears of rent. It appears that when the aforesaid notice was addressed to the landlord he refused to accept the same. Therefore, the said notice was sent by registered post. However, the landlord returned the said amount of Rs. 638/- and the said reply is produced at Exh. 41.

2.4 The plaintiff thereafter addressed a notice dated 21.7.1974 to the defendant tenant. The plaintiff again reiterated his contention of the earlier notice. He has stated that the standard rent was Rs. 31.50 ps. and denied the rent of Rs. 27/- as stated by the tenant. The said notice is produced at Exh. 44.

2.5 In view of the aforesaid premises, the original plaintiff Jayantilal Chunilal filed Regular Civil Suit No. 824 of 1974 against the defendant Tulsidas Nathubhai on the ground of arrears of rent i.e. rent due for 18 months from 6.11.1972 to 22.4.1974 Rs. 567/- and from 23.4.1974 to 30.4.1974 Rs. 8/- in all Rs. 575/- and further rent from 1.5.1974 to 31.5.1974 Rs. 31.50 ps. in all Rs. 606.50 ps. The plaintiff claimed possession of the suit premises under Section 12(3)(a) of the Bombay Rent Act. The plaintiff also claimed that the defendant has committed breach of tenancy terms and also created nuisance and as the plaintiff has addressed a notice but the defendant failed to hand over the suit premises and ultimately the rent is due from 6.11.1972, the defendant was in arrears of rent of Rs. 606.50 ps. As the rent was due and payable by the tenant, the plaintiff filed suit on 16.7.1974.

2.6 The original tenant Tulsidas Nathubhai filed a written statement at Exh. 14. He has raised the dispute regarding standard rent. He has stated that originally the rent was Rs. 27/- and not Rs. 31.50 ps. as alleged by the landlord. He has denied the arrears of rent. He has stated that rent upto 30.6.1974 amounting to Rs. 638/- was sent to the plaintiff by the tenant. However, the plaintiff landlord refused to take the amount. He has therefore stated that the defendant is not liable to hand over the possession under Section 12(3)(a) of the

Bombay Rent Act. He has also denied the contention of nuisance. The said reply was filed on 19.6.1975.

2.7 It appears that original tenant Shri Tulsidas Nathubhai died on 10.8.1975. The plaintiff had filed an application for bringing heirs of Tulsidas Nathubhai on record. Thereafter, the plaintiff filed an application Exh. 16 for amendment of the plaint on 19.9.1975 for bringing heirs and legal representatives of Tulsidas Nathubhai on record as defendant Nos. 1/1 Bachiben Tulsidas, 1/2 Amratlal Tulsidas, 1/3 Budhiabhai Tulsidas, 1/4 Manilal Tulsidas, 1/5 Dhansukhlal Tulsidas, 1/6 Ratilal Tulsidas, 1/7 Jayantiben Tulsidas. He has stated that defendant Nos. 1/1, 1/2 and 1/4 were residing with the deceased. However, the other defendants were not residing with the deceased Tulsidas Nathubhai and therefore, they had no interest in the property. However, without prejudice to their contention, the said amendment was filed for bringing all heirs and legal representatives of the deceased. The said application was filed on 19.9.1975 at Exh. 16. The learned trial judge has granted the same.

2.8 It appears that out of the legal heirs and representatives, Bachiben Tulsidas and Amratlal Tulsidas have filed additional written statement on 21.9.1976 at Exh. 25 to the said suit. They had raised contention regarding validity of notice. They have also raised contention regarding dilapidated condition of the premises in question. It appears that they have filed purshis at Exh. 24 dated 8.3.1974 debating the reply filed by the original defendant and thereafter filed a detailed reply at Exh. 25.

2.9 The learned trial Judge framed issues on 5.9.1977 at Exh. 27.

2.10 On behalf of the plaintiff Jayantilal Chunilal was examined at Exh. 34. He has stated that he is the owner of the suit property in view of the partition deed executed between their family members. He has stated that the suit premise was handed over on lease by the plaintiff to the deceased Tulsidas Nathubhai on rent of Rs. 31.50 ps. He has stated that the defendant was in arrears of rent from 6.11.1972 as stated in the notice as well as the plaint. He has produced rent receipt which shows that from December 1971 rent was at Rs. 33/-. The rent receipts have been produced at Exh. 36 on the record. He has also deposed regarding notice and reply by the defendants. He stated that the defendants did not raise the dispute regarding standard rent and the

defendants did not pay the rent within one month from the date of the notice and ultimately after the death of Tulsidas Nathubhai, his heirs and legal representatives were made parties in the suit. He has also stated that he has not charged education cess separately but on the back of the receipt he has written about education cess at Exh. 34.

2.11 On behalf of the defendant Amratlal Tulsidas was examined at Exh. 45. He happens to be son of Tulsidas. He has also admitted that respondent Nos. 1, 2, 4 were residing with the deceased Tulsidas Nathubhai at the time of his death. He has stated that originally rent was Rs. 27/- per month which has been increased to Rs. 31.50 ps. per month. He has stated that except rent of Rs. 31.50 ps., he has not paid anything to the landlord.

2.12 It may be noted that originally old Regular Civil Suit No. 824 of 1974 was converted into Rent Suit No. 1915 of 1975. The learned Small Causes Court, Surat, by his judgement and decree dated 26.10.1978 was pleased to hold that the defendant shall handover vacant possession of the suit premises to the plaintiff within three months from the date of the judgement. The learned trial judge fixed standard rent at Rs. 31.50 ps. per month. The learned trial judge further held that defendant No. 1/2 Amratlal Tulsidas shall pay Rs. 598.50 ps. to the plaintiff for arrears of rent from 6.11.1972 to 5.7.1976. Defendant No. 1/2 shall also pay future mesne profits to the plaintiff at Rs. 31.50 ps. per month from the date of the suit till delivery of possession.

TRIAL COURT'S FINDINGS:

2.13 It may be noted that while decreeing the suit, the learned trial judge has arrived at the following conclusion/findings:

(i) The plaintiff proved that the suit premises had been given on lease to the defendant on the terms and conditions stated by the plaintiff.

(ii) The suit notice was legal and valid and it was duly served on the defendant.

(iii) The plaintiff proved that the defendant is to be in arrears of rent exceeding six months on the date of the suit notice and on the date of the suit.

(iv) The learned trial judge held that the defendant

is not ready and willing to pay the standard rent and section 12(3)(a) of the Bombay Rent Act is applicable to the facts of the case.

(v) The plaintiff failed to prove that the defendant has committed breach of conditions of the tenancy.

(vi) The plaintiff failed to prove that the defendant has been guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupants.

(vii) The standard rent is fixed at Rs. 31.50 ps.

(viii) The learned trial judge held that the defendant is liable to pay Rs. 598.50 ps. and ultimately the plaintiff is entitled to vacant possession of the suit premises.

2.14 Being aggrieved and dissatisfied with the aforesaid judgement and decree, Bachiben Tulsidas and Amratlal Tulsidas filed appeal being Regular Civil Appeal No. 219 of 1978 before the District Judge, Surat on 28.11.1978 and ultimately the learned District Judge granted stay by the order dated 9.1.1979. The respondent landlord filed reply at Exh. 5 on 26.12.1978.

2.14A He has also filed an application at Exh. 18 dated 30.8.1979 stating that the defendants were ready and willing to pay education cess and as the defendants were not aware about the exact amount, they did not pay the education cess in this regard. Therefore, they filed an application for amendment the written statement. In the said application they stated that Section 12(3)(a) of the Bombay Rent Act is not applicable to them. However, the learned judge by his order dated 31.8.1979 was pleased to reject the said application for amending the written statement.

2.15 Being aggrieved and dissatisfied the petitioner filed Revision Application No. 1246 of 1979 before this Court on 21.9.1979. Originally the Court admitted the matter and granted stay and ultimately on 28.9.1979 the petitioner withdraw the said revision application. The Court passed the following order:

"Withdrawn by Mr. Vyas. Dismissed as withdrawn. Ad-interim stay granted on 21st September, 1979 vacated. Mr. Vyas says that he withdraws this application because the matter is at an

interlocutory stage".

2.16 It appears that during the pendency of the appeal the landlord filed application Exh. 24 on 12.11.1979 in which he has stated as under: The note was filed to show that the tenant was irregular in payment of rent. The tenant is not entitled to any protection of Rent Act.

Issue framed : 5.9.1977

Amount of arrears upto 31.5.1974 Rs. 606.50
Amount of arrears upto 31.8.1977 Rs. 1221.50
(34 months)

Rs. 1828.00

2.16A The tenant has paid Rs. 1835.00. Tenant paid Rs. 7/- in excess. However, tenant has not paid rent of September, October, November of 1977 and January, 1978.

2.16B Thereafter, Rs. 200/- was paid on 13.2.1978. Therefore, for the months of September, October, November, December and January, there was a default. Thereafter, Rs. 200/was paid on 16.2.1978 and excess Rs. 8/- in all Rs. 208/-. Therefore, even if the rent is paid for 7 months, there was default of 7 months. Thereafter, on 6.10.1978 Rs. 200/- was paid. In view of the same, there was a default from March to September, 1978. Though there are further payments, as there was already default, there was no question of the tenant getting protection in this behalf. On that note the tenant has stated that as there was a dispute of standard rent and the trial Court after fixing the standard rent ought to have given opportunity to the defendant to pay the amount of standard rent. It was further stated that thereafter notice amount was tendered and so as per the decision of this Court in the case of LALLUBHAI HARICHAND VS. HEIRS OF KHODIDAS HARIBHAI reported in 16 G.L.T. 31 the decree for possession cannot be passed.

APPELLATE COURT'S FINDINGS:

2.17 Thereafter, the matter was adjourned by the learned appellate Judge. The learned appellate Judge considered the entire evidence on record and was pleased to dismiss the appeal of the tenant. While dismissing the appeal the learned appellate Judge has held that the present suit is governed by the provisions of Section

12(3)(a) of the Rent Act. It may be noted that after holding the case falling under Section 12(3)(a) of the Bombay Rent Act and not within Section 12(3)(b) of the Act, the learned appellate Judge has also considered the alternative case of the appellant-tenant and after considering the evidence on record the learned appellate Judge has held that defendant should have deposited Rs. 31.50 which was contractual rent between the parties before fixing of the standard rent. He has relied on the decision of the Apex Court as well as judgement of this Court and held that it is for the tenant to make an application to the Court to decide the standard rent of the suit premises. He further held that the tenant has not chosen to make an application for standard rent and therefore as per the purshis at Exh. 24, the tenant has not deposited rent regularly and has also deposited rent at irregular interval and therefore the tenant is not qualified for protection of Section 12(3)(b) of the Bombay Rent Act and therefore tenant cannot be said to be ready and willing to pay the rent and confirmed the decree of the possession in this regard.

2.18 Being aggrieved and dissatisfied with the aforesaid judgement and decree, the petitioners original defendants have filed this Revision Application before this Court on 21.1.1980. The matter was admitted on 21.2.1980 and it is now ready hearing before this Court today. During the pendency of the Civil Revision Application it is noted that the landlord has filed Civil Application No. 770 of 1992. The landlord has also filed Civil Application No. 1528 of 2002 on the ground that the original petitioner Amratlal Tulsidas expired on 19.6.2001 and no heirs of Amratlal Tulsidas have been brought on record. Hence the revision application may be abated.

SUBMISSION OF THE LEARNED ADVOCATE FOR THE PETITIONER:

3.1 The property in dispute is the first floor of the property bearing nodh No. 3542, ward No. 3 situated in Vachlisheri, Nawapura. The contractual rent earlier was Rs. 27/- per month. However, it was increased to Rs. 31.50 due to increase in the taxes and facilities.

3.2 The petitioners are the tenants, the heirs of the Original defendants. Respondent No. 1 is the landlord, the original plaintiff. Respondent Nos. 2 to 6 are the original defendants and also the heirs of the tenant deceased Tulshidas Nathubhai.

3.3 It was further stated that Tulshidas Nathubhai tried to tender the arrears of the rent to respondent No. 1 but he refused to accept the same and therefore he personally tried to tender reply to the notice on 14.7.1974 and also tried to pay up the arrears. However, respondent No. 1 refused to accept the reply to the notice and the arrears of the rent. Hence, Tulshidas Nathubhai was compelled to give reply through the advocate on 15.7.1974 (Exh. 41) stating therein that Rs. 31.50 is not the standard rent; that the said property was earlier given to one Kauva Bhagat at the rate of Rs. 5/- per month and thereafter the same was rented to him at the rate of Rs. 27/- per month and thereafter the rent has been falsely increased. It was further stated that no rent is in arrear, and there is a dispute as to the standard rent. The advocate also tendered Rs. 638/being rent till 30.6.1974. However, the same was also refused by the advocate of the landlord. The said reply to the notice dated 15.7.1974 (Exh. 41) was sent by the registered A.D. post vide receipt dated 16.7.1974 at Exh. 42 and it was received by the plaintiff on 18.7.1974 vide acknowledge dated 18.7.1974 at Exh. 43.

3.4 In view of the same, the learned counsel has made the following submissions:

3.5 Both the Courts below have committed grave error of law in holding that the case is governed by Section 12(3)(a) of the Bombay Rent Act and have passed eviction decree which has resulted into miscarriage of justice. The learned counsel further submitted that though there is concurrent finding of facts in the present case, there is an error of substantial question of law with regard to whether section 12(3)(a) or 12(3)(b) of the Bombay Rent Act will apply and so this Court has power under section 29(2) interfere with the said order in view of various decisions of this Court and the Hon'ble Apex Court.

3.6 In the present case it is an admitted position that the rent includes taxes and that the petitioners are also liable to pay the Education Cess. Responsibility of Payment of Tax is necessary. This is very much evident from the evidence produced before both the Courts. However, the Courts have erred in law in holding that the present case falls under Section 12(3)(a) of the Bombay Rent Act. It is interesting to note that the lower appellate Court has believed the case of the petitioner tenant and has rightly considered the citations produced at the Bar.

3.6A In this behalf learned advocate has also relied

on the notice dated 9.5.1974 at Exh. 37, para 3 and counter reply to the notice dated 21.7.1974 by the landlord, Exh. 44, para 4, plaint of the suit dated 16.7.1974, Exh. 1, para 2, deposition of landlord Jayantilal Chunilal Exh. 34, para 16 in which it was stated thus:

"I have paid municipal taxes except this year. The contents of the suit notice at exh. 37 are true. It is mentioned therein that defendant was not paying education cess."

3.6B The learned counsel has also relied on the deposition of tenant Amratlal Tulshidas at Exh. 45, para 4 in which it was stated that "my father was ready and willing to pay education cess also on landlord showing its receipt." In view of the same it was submitted as under:-

"Thus mere perusal of the above evidence, it is crystal clear that the landlord-plaintiff himself has admitted that the tenant is liable to pay education cess and that though asked, he is not paying. Not only that he has stated that the rent of Rs. 31.50 was increased due to increase in taxes and facilities. Thus, as per the plaintiff himself, the rent which is charged from tenant includes taxes. Nothing is controverted by the petitioner-tenant. However, to see that the case is taken out from the purview if section 12(3)(a) of the Bombay Rent Act he has not specifically demanded taxes in the notice and plaint. However, admission in notice, plaint, counter-reply and deposition is enough to take out the case from the provisions of Section 12(3)(a). As the education cess and taxes are payable annually and in present case the petitioner-tenant is liable to pay taxes, the rent is payable annually and not monthly and hence the present case is covered by provisions of Section 12(3)(b) but lower Courts have erred in law and have considered the case under Section 12(3)(a) of the Bombay Rent Act which is required to be altered in the interest of justice. The present case is not satisfying all conditions of Section 12(3)(a)."

3.7 The learned counsel submitted that when education cess formed part of the rent as per the contract as the education cess was not payable monthly and rent, therefore, is not paid monthly and deposit of arrears

gives protection of Rent Act under Section 12(3)(b) and the case would fall under section 12(3)(b). In support of the same, the learned counsel has relied on the Division Bench judgement of this Court in the case of DAYALAL GANGARAM VS. BHIMANI BHUPATRAI CHUNILAL & ANR. reported in 18 GLR 349 and after referring to the provisions of the Gujarat Education Cess Act, 1962 in paragraph 3, the learned Judge has observed in paragraph 4 thus:

> "Thus, Sec. 19(3) read with Sec. 21 is really a legislative judgement itself that the amount of this education cess which a landlord is entitled to recover under Sec. 19(1) from the tenant after he has paid the same is not deemed to be unlawful increase for the purpose of Sec. 7 but a permitted increase and for the purpose of recovery of that amount the landlord is given the same rights and remedies as he would have if the said amount were rent payable to him. Therefore, both for the purpose of recovery of such rent by way of this education cess amount to the recovery of which the landlord is entitled under Sec. 19(1) and for distress for such rent the landlord's rights and remedies are the same as if such sums were actual rent payable to him by the tenant from whom he was entitled to receive the same. Therefore, such permitted increases within the meaning of Sec. 7 of the Rent Act as per the statutory language of Sec. 19(3) would become part of the rent and these arrears would clearly attract gross default clause under Sec. 12(3)(a).

3.7A In para 9 on page 358 the Court further observed as under:

> "So far as the Gujarat Cess Act is concerned, specific provision is made for treating it as permitted increase under Sec. 19(3) and so this comprehensive scheme under Secs. 21 and 22 has been enacted which on the contrary clinches the issue of this being permitted increase which always forms part of the rent as per the settled legal position."

3.7B The learned counsel has also relied on the judgement of this Court in the case of PRAKASH SURYA VS. RASIKLAL ISHVERLAL MEHTA reported in 18 G.L.R. 1024 which laid down similar principle. Similar principles were laid down in the case of GANPATRAO JAYAVANTRAO DESHMUKH VS. SAGNUBAI RAMCHANDRA YADAV & ORS. reported

in 15 G.L.R. 300.

3.8A Now as the present case is not covered by Section 12(3)(a), it will fall under the provisions of Section 12(3)(b) of the Bombay Rent Act. In this case the suit was decided in 1978 and the appeal in 1979 and hence old provisions of Section 12(3)(b) will apply. Now it is held in numerous judgements, that the tenant in order to get protection under Section 12(3)(b) of the Bombay Rent Act must satisfy the following conditions:

(1) The tenant deposits on the first date of hearing the suit or on or before such other date as the Court may fix the standard rent and permitted increases.

(2) The tenant further continues to pay or tender in Court such rent and permitted increases regularly till the suit is finally decided as well as the appeal.

(3) The tenant pays the costs of the suit as directed by the Court.

3.8B In the present case the petitioner tenants have complied with the above stated conditions and hence they are entitled to the protection against eviction. However, both the Courts below have erred in law while considering the case of the petitioner tenants which requires to be corrected in the interest of justice. In the present case the petitioners had raised standard rent dispute in reply to the notice, written statement and evidence (deposition) and therefore the trial Court had framed specific issue of standard rent which was decided along with the suit.

3.8C Now in the present case, the issues came to be framed on 5.9.1977 and by that time the tenant has paid Rs. 1835/- against the amount due of Rs. 1828/-. The tenant has paid about Rs. 200/- on 13.2.1978, Rs. 200/on 6.10.1978 and Rs. 150/- on 12.10.1978. The learned counsel further submitted that trial Court has given judgement on 26.10.1978 by which the trial Court determined the standard rent and the tenant has paid excess Rs. 117/- than the amount due on the date of decision. The learned counsel further claimed that the appellate Court has given judgement on 12.11.1979 by that time the tenant has paid Rs. 100/- on 18.1.1979, Rs. 100/- on 11.7.1979, Rs. 125/- on 15.7.1979 and Rs. 250/- on 28.8.1979. For showing this the tenant has filed additional affidavit in this behalf showing receipt

of the payment. Thus, it was stated that the tenant has complied with the conditions of Section 12(3)(b) of the Bombay Rent Act.

3.8C.1 The learned counsel has also relied on the decision of this Court in the case of CHAMPABEN VS. GOPINATH reported in 21 GLR 709 particularly paragraph No. 9 on pages 713-714 the Court has observed thus:

> "Miss Shah's second submission was that in any case the petitioners would be entitled to possession on the ground of arrears of rent. Now it transpires from the record that the 1st defendant was in arrears of rent much prior to the time when the suit notice, Ex. 86, was served upon defendant No. 1. Thus the main ingredient of Sec. 12(3)(a) was satisfied viz., that at the time of service of notice, defendant No. 1 was in arrears of rent for more than six months. However, the said provision cannot be pressed in service by the plaintiffs for the simple reason that the plaintiffs demanded municipal taxes in the said notice. Admittedly municipal tax was not payable by month and hence the case was taken out of the operation of Sec. 12(3)(a) of the Act as held by this Court in the case of Meheshwari Mills (Mohanlal V. Maheshwari Mills Ltd.) 3 G.L.R. 574 which has been later approved by the Division Bench of this Court consisting of A.D. Desai & M.C. Trivedi JJ. in C.R.A. No. 459/70 decided on 2.8.76. Miss Shah thereafter submitted that in any case defendant No. 1 was liable to be evicted under Sec. 12(3)(b) of the Act. But the said submission is also liable to be rejected as it has been clearly established on the record that the dispute as to the standard rent was resolved by the learned trial Judge for the first time in the judgement when issue No. 5 was decided and Rs. 60/- per month was fixed as the standard rent. The tenant went on depositing various amounts in the trial Court and by the time the judgement was delivered by the trial Court, the tenant had deposited an amount of Rs. 9,484/-. Now calculating the amount of rent at the rate of Rs. 60/- P.M. as fixed by the learned trial Judge, the amount of Rs. 6060/- was due by way of arrears of rent till the date of the trial Court's judgement while the deposited amount came to Rs. 9,484/-. The said amount was sufficient not only to cover arrears of rent till 9.12.74 but even till the

date of the appellate Court decree i.e 20.6.77 as the appellate Court decided the appeal on 1.7.77. The total claim made by the plaintiffs worked out to Rs. 8,794/- while the tenant had deposited in the Court an amount of Rs. 9,484/- which was far in excess of the rent which would fall in future and the said deposit would cover by way of advance deposit, the amount of rent which was to fall due even during the pendency of the appeal. In that view of the matter, it cannot be said that defendant No. 1 had not complied with the provisions of Sec. 12(3)(b) of the Act."

3.8C.2 The learned counsel has relied on the decision of this Court in the case of CHHOTUBHAI ZINABHAI VS. I.M. ATODARIA reported in 1999(3) G.C.D. 2583 in which on page 2585 the Court observed as follows:

"It is, therefore, obvious from the provision of Section 12(3)(b) of Rent Act as they stood prior to the Amendment of 1985, that if the case is not covered by Section 12(3)(a) of the Rent Act, decree for eviction can be passed under Sec. 12(3)(b) of the Act. However, the tenant can save eviction under Sec. 12(3)(b) provided he deposited on the first date of hearing the suit or on or before such other date as the Court may fix the standard rent and permitted increases and further continue to pay or tender in Court such rent and permitted increases regularly till the suit is finally decided and pays costs of the suits as directed by the Court. It is thus clear that only when these three conditions are satisfied by the tenant that he can save his eviction. The first condition is that he should have deposited the rent on the first date of hearing of the suit or on any subsequent date as directed by the Court. The second condition is that the tenant continues to deposit such rent or standard rent regularly in Court till the suit is finally decided. The word "suit" is inclusive of the word "appeal" in as much as the appeal is continuation of the suit. Thus, the same procedure is to be followed by the tenant namely he has to deposit the rent regularly in appeal as well. The third condition is that the tenant shall pay the costs of the suit as directed by the Court. If any of these three conditions are not fulfilled by the tenant, he will not be entitled to protection 12(3)(b) of the Rent Act."

3.8C.3 The learned counsel has further relied on the observations at page 2588 thus:

"From the chart of calculation filed by the learned counsel for the respondent, it appears that the rent was deposited regularly in the appellate Court rather excess amount was being deposited in the appellate Court. Thus from the comparative study of the two charts submitted by the learned counsel for the respective parties, it is clear that even during the pendency of appeal, the respondent tenant cannot be said to have committed default in depositing the rent regularly rather went on depositing the rent in the appellate Court in advance. Thus, even at the third stage, the respondent cannot be said to have committed any default in regularly depositing the rent. The lower appellate court, in these circumstances, was justified in giving benefit of Sec. 12(3)(b) of the Bombay Rent Act to the tenant."

3.9A The learned counsel for the petitioner has further relied on the decision of the Hon'ble Supreme Court in the case of MOHAN LAXMAN HEDE VS. NOORMOHAMED ADAM SHAIKH reported in AIR 1988 SC 1111 in which on page 1114 at para 5 the Hon'ble Supreme Court has observed as under:

"The provision of S. 12(1) has already been set out. In the present case, the provisions of cl. (a) of sub-sec. (3) of S. 12 have no application as there was a dispute regarding the amount of standard rent. Hence the provisions which we have to consider are those contained in cl. (b) of sub-sec. (3) of S. 12 of the Bombay Rent Act. This clause read in the context makes it clear that no decree for eviction can be passed in a suit for recovery of possession on the ground of non-payment of standard rent or permitted increases instituted by the landlord against the tenant, if on the first day of the hearing of the suit or on or before such a date, as the Court may fix, the tenant pays or deposits in Court the standard rent and permitted increases then due and thereafter continue to pay or deposits in Court regularly such rent and permitted increases till the suit is finally decided and also pays the costs of the suit as

directed by the Court."

3.9B The learned counsel for the petitioner has also relied on the decision of the Hon'ble Supreme Court in the case of I.A. SHAIKH VS. K.S. AGARWAL (1994) 35(2) G.L.R. 1591 in which after referring to the decision in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF reported in AIR 1968 SC 1109, the Supreme Court has observed at para 3 as under:

"The Act is a welfare legislation interposing into the contractual rights of the landlord and tenant and regulating the letting of the buildings and determination of the standard rent and permitted increases in accordance with the Act. The tenant is obligated to pay the rent to the landlord every month unless the landlord refuses to receive it. In the latter event recourse can be had to deposit the rent. Some statutes provide the procedure for deposit in the Court of the Rent Controller after following the procedure prescribed therein. If the tenant commits default in the payment of the rent the Act provides that the landlord is entitled to file an application for eviction if the arrears of rent continues for six months and more. The Act also prescribes issuance of a notice determining the tenancy for failure on the part of the tenant to pay the arrears of standard rent or permitted increases for six months and more and for delivery of possession. In case the tenant disputes the standard rent or permitted increases claimed in the notice, the tenant enjoined under Section 12(3)(a) to dispute the correctness thereof and to plead prevailing one by issuing reply notice within one month from the date of its receipt. In that situation it is manifest that the landlord elected his statutory right to determine the tenancy on account of arrears for a period of six months or more. The landlord put the tenant on notice of his negligence and to make payment thereof within one month from the date of the receipt of the notice and on disputation is enjoined to seek remedy under Section 11(3) for determination of the standard rent or permitted increases. If he fails to dispute and omits to pay the arrears within one month from the date of the receipt of the notice, he became liable to be evicted under Sec. 12(3)(a) of the Act. Admittedly, the statute did not prescribe any period of

limitation under Sec. 11(3) to apply the application for fixation of standard rent or permitted increases. Therefore, by necessary construction of Secs. 11 and 12, what this Court appears to have intended was that the tenant should dispute the standard rent or permitted increases within one month from the date of the receipt of the notice and then file the application under Sec. 11(3). It would not appear to have been meant that the application under Sec. 11(3) should also be filed within one month from the date of the receipt of the notice. But expeditious action is called for to prove the bona fides of the tenants disputing the right of the landlord in the claim of standard rent or permitted increases. The Act appears to have intended to quench thirst of the avaricious landlord to claim the rent in excess of the standard rent or permitted increases under the Act and at the same time obligated the tenant, in case of his dispute or disagreement, to have the statutory recourse for determining standard rent or permitted increases. Therefore, expeditious action had to be had before the receipt of the notice from the Court which would indicate not only bona fides on the part of the tenant in resisting the claim for excess standard rent or permitted increases but also to have his right to pay the standard rent or permitted increases determined accordingly to law."

3.9C The learned counsel for the petitioner has relied on the judgement of this Court in the case of BAI REVABEN WD/O SITARAM GANGARAM VS. SINDHI MEGHNATH ENSHIRAM reported in 21 GLR 560 where the Court has held that so far as provisions of Section 12(3)(b) of the Bombay Rent Act are concerned, it should be held that a suit is finally decided by the decision in appeal. The tenant is not obliged to abide by the conditions of Sec. 12(3)(b) of the Act epnding the decision of the revision application, if any, filed under Section 29(2) of the Act.

3.9D The learned counsel for the petitioner has also relied on the unreported judgement of this Court in the case of PARSOTTAMDAS KHEMCHANDDAS PATEL VS. SMT. PRABHUTA PANCHOLI AND OTHERS (1983 G.L.H. (UJ) 71) on page 55 where the Court has held that under Section 12(3)(b) irregular payments of rent during the pendency of appeal - sufficient rent paid in advance, provisions of Section complied with.

SUBMISSION OF THE LEARNED COUNSEL FOR THE RESPONDENT MR. UMESH D. SHUKLA:

4. The learned counsel for the respondent has relied on the provisions of Section 11, 11(1)(e), 11(2), 11(4), 12(1), 12(3)(a) and 12(3)(b) of the Bombay Rent Act. The said sections read as follows:

"11(1) -

(a) to (d) xxxxxxxxx

(e) Where there is any dispute between the landlord and the tenant regarding the amount of standard rent.

11(2) - If there is any dispute between the landlord and the tenant regarding the amount of permitted increase the Courts may determine such amount.

11(4) - Where at any stage of a suit for recovery of rent, whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may, make an order directing the tenant to deposit in Court forthwith such amount of rent as the Court considers to be reasonably due to the landlord. The Court may further make an order directing the tenant to deposit in Court, monthly or periodically, such amount as it considers proper as interim standard rent during the pendency of the suit. The Court may also direct that if the tenant fails to comply with any such order within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court which leave may be granted subject to such terms and conditions as the Court may specify.

12(1) - A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this

Act.

12(1A) and 12(2) xxxxxxxx

12(3)(a) - Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession.

12(3)(b) - In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter:

(i) - continues to pay or tender in Court such rent and permitted increases till the suit is finally decided; and

(ii) - pay costs of the suit

as directed by the Court."

4.1 The learned counsel for the respondent has pointed out all the facts. He has made the following submissions.

4.2 In the present case, the notice (Exh. 37) was sent on 9.5.1974. After receipt of such notice, the tenant did not raise any dispute as to standard rent within one month. The tenant did not also give any reply to the notice within one month. Such reply was given on 17.7.1974 (Exh. 41). Therefore, the tenant did not comply with the conditions of Section 12(3)(a). The tenant did not also make any application under Section 11 for the fixation of the standard rent either by way of a separate proceedings or in the same suit. The tenant merely rested by raising a dispute in the written statement. Since the tenant has not complied with the conditions of Section 12(3)(b) and has not regularly deposited rent, the tenant is not entitled to protection under the Bombay Rent Act.

4.3 Section 12 provides that no ejectment shall be

made if the tenant pays or ready and willing to pay standard rent and permitted increases. Section 12(1) provides that the landlord shall not be entitled to possession so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases and performs other conditions of tenancy.

4.4 Section 12(2) provides that the suit for recovery of possession shall not be filed on the ground of non-payment of rent until the expiration of one month next after notice in writing demanding the rent is served upon the tenant as per Section 106 of T.P. Act. In case when the tenants default in payment of rent and when the landlord seeks to recover possession on the ground of arrears of rent, section 12 classifies all such cases into two parts. Section 12(3)(a) deals with the cases where the rent is payable by the month and there is no dispute regarding the rent of standard rent. Therefore, if both these conditions are satisfied, the case would fall under Section 12(3)(a). If the rent is not payable by the month or if there is a dispute regarding the standard rent, the case would fall under Section 12(3)(b). In cases where the dispute is not raised regarding the standard rent within one month after the notice and the rent is not payable by the month, the case would fall under Section 12(3)(b).

4.5 When the case falls under Section 12(3)(b), the decree for eviction cannot be passed if the tenant pays the standard rent on the first day of hearing of the suit and thereafter continues to pay such rent till the suit is finally decided. Prior to 1985, the Section 12(3)(b) required the tenant to pay such rent regularly till suit is decided.

4.6 Under Scheme of Section 12, there is no procedure prescribed for fixation of the standard rent and the same is dealt with by Section 1. Section 11, sub-section 3 provides that if any application is made by the tenant who has received notice from his landlord under section 12 sub-section (2), the Court shall make an order to deposit such sum as may be reasonable pending the final decision and also provides for consequential steps. Reading Section 11 and 12 together, it is clear that when a tenant receives a notice under Section 12(2) and does not raise the dispute about the standard rent within one month and also does not make application under Section 11 sub-section (3), then he is liable to be evicted under Section 12(3)(b) if he does not regularly pay the rent till the suit is finally decided. Merely by raising a dispute about standard rent in the written statement, the

tenant cannot sit quiet and claim protection of Section 12(3)(b) on the pretext that he did not know what was the standard rent of the suit premises.

4.7 The learned counsel for the respondent has relied on the judgement in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF reported in AIR 1968 SC 1109 particularly paragraph Nos. 10 and 12 of the judgement which read thus:

"para 10 - It appears to us that there is no substance in the contention put forward on behalf of the appellant. Section 12(1) must be read with the Explanation and so read it means that a tenant can only be considered "to be ready and willing to pay" if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified by the Court. We have already noted that the tenant made no payment within the period of one month of the notice of ejectment and although in his written statement he raised a dispute about the standard rent he made no application in terms of Section 11(3) of the Act. The readiness and willingness to pay has therefore to be judged in the light of the facts of the case."

"Para 12 - As already noted, if sub-sec. (3)(a) is not attracted, the tenant, if he is in arrears, cannot sit quiet and offer to pay all the amount due from him at the time of the hearing of the suit so as to get the protection of Section 12(1). To be within the protection of sub-section (1) where he raises a dispute about the standard rent payable he must make an application to the Court under sub-section (3) of Section 11 and thereafter pay or tender the amount of rent and permitted increases, if any, specified in the order made by the Court. If he does not approach the Court under Section 11(3), it is not open to him thereafter to claim the protection 12(1)."

4.8 The decision reported in SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra) is directly on the point. It is the decision of the Hon'ble Supreme Court. In that case, the landlord gave a notice to the tenant on 18.4.1955 demanding the arrears of rent

and permitted increases and also terminated tenancy with effect from 31.5.1955. Such notice was received on 21.4.1955. There was no reply to such notice. The suit for ejectment was filed on 15th March, 1956. In the written statement, the tenant raised a dispute as to standard rent and also contended that standard rent had to be fixed first and then preliminary issue in respect of that should be framed. He did not make any application under Section 11(3) for the fixation of the standard rent. In this factual drawback, the Hon'ble Supreme Court held that Section 12(1) must be read with the Explanation and so a tenant can only be considered to be ready and willing to pay if before the expiry of the one month after notice referred under Section 12 sub-section 2, he makes an application under Section 11, sub-section 3 and pays the amount as may be specified by the Court. Their Lordships specifically noted that the tenant made no payment within one month of notice and although in his written statement, he raised a dispute about the standard rent. He made no application in terms of section 11, sub-section 3. Their Lordships further held that in a case where a suit is filed on the ground of arrears of rent and although raising a dispute in the written statement, the tenant makes no application in terms of section 11, sub-section 3, he cannot claim the protection of section 12(1) by offering to pay when the Court is about to pass a decree against him. They further held that if sub-section 3 is not attracted the tenant if he is in arrears cannot sit quiet and offer to pay all the amount due from him at the time of hearing, they specifically held as under:

"To be within protection sub-section (1) where he raises a dispute about standard rent payable, he must make an application to the Court under sub-section 5 of Section 11 and thereafter pay as specified by the Court.

4.8A The learned counsel has, relying on the judgement of the Hon'ble Supreme Court in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra), submitted that the Hon'ble Supreme Court has clearly laid down that in a suit for eviction on the grounds of arrears of rent for a period of more than six months, the tenant ought to raise a dispute as to standard rent in the manner prescribed in the Act. If the tenant does not make any application in terms of Section 11(a) he cannot claim protection of Section 12(1) by merely offering to pay or even paying all arrears due with a court is about to pass a decree against him. To be within the protection of sub-section (i) where the

tenant raises dispute about standard rent payable, he must make an application to the Court under sub-Section (3) of Section 1. If he does not approach the Court under Section 11(3) it is not open to him to claim protection under Section 12(1). It is further held that the tenant must continue to pay regularly during the pendency of the suit. In para 13 of the judgement it is mentioned that the tenant failed to deposit the rent regularly during the pendency of the suit. The facts of the case show that against the dues of Rs. 1,561/- the tenant paid Rs. 1,554/-. Even though the tenant was in default only for a sum of Rs. 7.00 yet the Hon'ble Supreme Court confirmed decree of eviction by holding that the tenant was not regular in payment of rent.

4.8B It was therefore submitted that in view of the aforesaid decision of the Hon'ble Supreme Court, it is clear that a tenant must make an application for fixation of standard rent in order to claim protection of Section 12(1).

4.9 He has further relied on the judgement of the Hon'ble Supreme Court in the case of GANPAT LADHA VS. SASHIKANT VISHNU reported in 19 G.L.R. 502. The Hon'ble Supreme Court after referring to the decisions in the cases of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra) and HARBANSLAL JAGMOHANDAS & ANR. VS. PRABHUDAS SHIVLAL, 1976(3) SCR 628, in para 11 of the judgement has observed thus:

"It is clear to us that the Act interferes with the landlord's right to property and freedom of contract only for the limited purpose of protecting tenants from misuse of the landlord's power to evict them, in these days of scarcity of accommodation, by asserting his superior rights in property or trying to exploit his position by extracting too high rents from helpless tenants. The object was not to deprive the landlord altogether of his rights in property which have also to be respected. Another object was to make possible eviction of tenants who fail to carry out their obligation to pay rent to the landlord despite opportunities given by law in that behalf. Thus, Sec. 12(3)(a) of the Act makes it obligatory for the Court to pass a decree when its conditions are satisfied as was pointed out by one of us (Bhagwati, J) in Ratilal Balabhai Nazar Vs. Ranchodbhai Shankerbhai Patel & Ors. AIR 1968 Gujarat 172: IX GLR 48. If there is

> statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under Sec. 12(3)(a) to get a decree for eviction. But where the conditions of Sec. 12(3)(a) are not satisfied, there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the conditions set out in Sec. 12(3)(b) and defeat the landlord's claim for eviction. If, however, he does not fulfil those conditions, he cannot claim the protection of Sec. 12(3)(b) and in that event, there being no other protection available to him, a decree for eviction would have to go against him. It is difficult to see how by any judicial valour discretion exercisable in favour of the tenant can be found in Sec. 12(3)(b) even where the conditions laid down by it are satisfied to be strictly confined within the limits prescribed for their operation. We think that Chagla, C.J., was doing nothing less than legislating in Kalidas Bhavan's case 60 Bom. L.R. 1359, in converting the provisions of Sec. 12(3)(b) into a sort of discretionary jurisdiction of the Court to relieve tenants from hardship. The decisions of this Court referred to above, in any case, make the position quite clear. Sec. 12(3)(b) does not create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the Section. If the statutory provisions do not go for enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of Courts."

4.9A After relying on the aforesaid judgement GANPAT LADHA VS. SASHIKANT VISHNU (supra) the learned counsel submitted that in that case the Hon'ble Supreme Court has clearly laid down that the conditions mentioned in Section 12(3)(b) are mandatory and must be strictly observed for seeking its benefit. Section 12(3)(b) does not create any discretionary jurisdiction on the Court. The tenant can defeat the landlord's case for eviction only if he complies with conditions laid down in Section 12(3)(b). The conditions of Section 12(3)(b) are mandatory and cannot be lightly taken by the tenant. The facts of the case are found in first two paragraphs of the judgement. One application for fixation of standard rent was made by the predecessor in title of the tenant on 17.2.1960, the contractual rent of Rs. 50.00 was

reduced and standard rent of Rs. 54.24 was fixed. Yet the tenant did not pay such standard rent and it remained in arrears from 1956 to 1960 even after fixation of the standard rent. On 30.6.1960 termination notice was sent claiming arrears of rent at Rs. 54.25. The revision filed by the tenant before the Bombay High Court against fixation of standard rent was dismissed. In these facts, the Hon'ble Supreme Court negatived contention of the tenant claiming protection under Section 12(1) on the ground that mandatory conditions of Section 12(3)(b) were not satisfied and the tenant did not pay standard rent within one month of the termination notice. In para 10 the Hon'ble Supreme Court reiterated that interpretation of Section 12(3)(b) as settled after the decision in Dhansukhlal's case (supra) and subsequently followed in Harbanslal Jagmohandas (supra).

4.9B Relying upon the aforesaid judgement, the learned counsel submitted that the Hon'ble Supreme Court has held that the term `regularly' appearing in Section 12(3)(b) is mandatory and not directory. In case of monthly tenancy Court has no distinction to treat payments made on irregular intervals as sufficient compliance with clause (b). In para 7 of the judgement a chart is provided. It shows that during the pendency of the appeal the tenant did not pay rent every month or in advance. The tenant deposited rent in the Court 16 times at intervals ranging from 2 to 4 months. The appellate bench of the Small Causes Court as well as the High Court found that there was substantial compliance with Section 12(3)(b). In spite of the aforesaid, the Hon'ble Supreme Court set aside the judgement and order of the High Court and passed a decree for possession in favour of the landlord. In para 12 it is clearly laid down that if the tenant persistently defaults during the pendency of the suit or appeal in paying rent, such as where he paid it at irregular intervals two or three or four months as is the case before this Court. In the present case the Court has no discretion to treat what were manifestly irregular payments as substantial compliance.

4.10 The learned counsel has also relied on the judgement of the Apex Court in the case of MRANALINI B. SHAH AND ANOTHER VS. BAPALAL MOHANLAL SHAH reported in AIR 1990 SC 954 in which at para 12 on page 956 the Court observed as under:

"The above enunciation, clarifies beyond doubt that the provisions of clause (b) of Section 12(3) are mandatory, and must be strictly complied with by the tenant during the pendency

of the suit or appeal if the landlord's claim for eviction on the ground of default in payment of rent is to be defeated. The word "regularly" in clause (b) of Section 12(3) has a significance of its own. It enjoins a payment or tender characterised by reasonable punctuality, that is to say, one made at regular times or intervals. The regularity contemplated may not be a punctuality, of clocklike precision and exactitude, but it must reasonably conform with substantial proximity to the sequence of times or intervals at which the rent falls due. Thus, where the rent is payable by month, the tenant must, if he wants to avail of the benefit of the latter part of cl. (b), tender or pay it every month as it falls due, or at his discretion in advance. If he persistently defaults during the pendency of the suit or appeal in paying the rent, such as where he pays it at irregular intervals of 2 or 3 or 4 months - as is the case before us - the Court has no discretion to treat what were manifestly irregular payments, as substantial compliance with the mandate of this clause irrespective of the fact that by the time the judgement was pronounced all the arrears had been cleared by the tenant."

4.11 The learned counsel has further relied on the decision of the Hon'ble Supreme Court in the case of JOSHI BHURARAM DATTARAM VS. JIVIBAI D. MULCHAND (MRS.) reported in 1995 Supp. (3) SCC 416 in which on page 418 at para 4 the Court observed as follows:

"We have no hesitation to hold that since the appellant had not raised dispute as regards the standard rent nor availed of the remedy under Section 11(3) of the Act, it is not permissible for him to raise the plea for the first time in the written statement. Equally the contention that the standard rent is only Rs. 9 and that the tenant is not liable to ejectment on the basis of the notice under Section 12(2) that he is to pay arrears at the rate of Rs. 20 per mensem. Since the appellate Court has given the finding that the standard rent is only Rs. 9 and as its correctness was not canvassed, we affirm it and on that footing the arrears were at the rate of Rs. 9 but as found by the appellate Court that his plea of payment was not proved, he was in default for 72 months in payment of rent. It is a finding of fact. There is no error of

law. So we are not inclined to interfere with the decree of ejectment passed by the Courts below."

4.12 The learned counsel further relied on the decision of this Court in the case of JOSHI RATANSHI GOPALJI VS. NAROTTAM NARANJI MEHTA ORS. reported in 1996(1) GCD 61 in which at para 10 the Court has observed as under:

"It could very well be seen from the aforesaid deposits that the tenant remained negligent in depositing the rent regularly. He remained persistent and consistent defaulter during the pendency of the suit. Even during the pendency of the appeal, he has not paid rent regularly as required by law. Therefore, even after fixation of standard rent by the trial Court, the tenant failed to pay or tender the amount of rent then due in the appeal and thereafter to pay rent regularly during the pendency of the appeal. The tenant had admittedly not replied to the notice for payment of rent. No dispute of standard rent was raised within one month from the receipt of notice. There was no payment of rent in arrears then due on the first date of hearing. The tenant had not paid any amount of rent during the pendency of the suit. Payment of rent during the pendency of the appeal also was not regular. The tenant remained habitual defaulter and regularly irregular in making payment of rent during the pendency of the appeal. In the circumstances, the tenant would not be entitled to protection of provisions of Section 12(3)(b). The contention that the tenant is entitled to protection of the said provisions is not acceptable and sustainable.

4.13 Further in paragraph 11 of the judgement the Court has observed thus:

"Therefore, the decree for eviction on the ground of non-payment of rent must follow against the tenant under Section 12(3)(b). With the result, the impugned judgement and decree recorded by the appellate Court against the tenant under Section 12(3)(b) is required to be confirmed."

4.14 If he does not approach the Court under Section 11(3), it is not open for him thereafter to claim the

protection of Section 12(1). Finally, on facts, the protection under Section 12(3)(b) was denied.

4.14A In this case also, standard rent was fixed only by the judgement. The aforesaid decision is further confirmed and followed by the Supreme Court in the case of JOSHI BHURARAM DATTARAM VS. JIVIBAI D. MULCHAND (MRS.) (supra). Their Lordships have clearly followed the decision in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra). The facts in that case were also very clear. A notice terminating the tenancy was given on he ground of arrears of rent. The tenant in the written statement raised a dispute about the standard rent. There was no dispute raised about the standard rent in reply to the notice. In fact, there was no reply to the notice. There was no application filed under Section 11(3) within one month from the date of receipt of notice. The Trial Court passed the decree on the ground that the dispute was not properly raised within the time limits of one month. Upon examination the claim of Bombay Rent Act, it is held that on the disputation between the landlord and tenant about the standard rent, it shall be determined under Section 11 sub-section (1). When there is a demand of rent by a notice under Section 12(2), the Court is required to determine the standard rent if an application is made within 30 days and pending determination it shall specify the amount of rent which the tenant has to deposit. Their Lordships have further held that the Act provides remedy and procedure to determine the standard rent or permitted increases. Section 1, sub-section (3) prescribes limitation to avail of remedy. If the tenant omits or vagues disputation and does not interfere the jurisdiction of Court under Section 11, it is not permissible to the tenant thereafter to resist plea in the written statement disputing the standard rent. Their Lordships found that the tenant did not avail of the remedy under Section 11 and did not dispute the standard rent in reply to the notice, they relied upon the decision reported in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra). It was further held that they have no hesitation in holding that since the appellant had not raised as regards standard rent nor availed of remedy under Section 11(3), it is not permissible for him to raise plea for the first time in the written statement. Hence following the decision in the case of SHAH DHANSHUKHLAL CHHAGANLAL (supra), a decree for eviction was confirmed.

4.15 To the same effect, a decision is reported in the case of JOSHI RATANSHI GOPALJI VS. NAROTTAM NARANJI

MEHTA ORS. (supra). In that case also a notice under Section 12, sub-section 2 was given on 9.9.1976. Such notice was not replied at all. In fact, such notice was not accepted. The tenant did not raise a dispute of standard rent within one month. No reply to the notice was sent. No application for fixation of standard rent was made.

4.15A The learned counsel for the respondent submitted that the tenant has relied on the judgement of the Hon'ble Supreme Court in the case of MOHAN LAXMAN HEDE VS. NOORMOHAMED ADAM SHAIKH (supra). He submitted that in the said case the Hon'ble Supreme Court has clearly laid down that exact or mathematical punctuality is not required in deposit of rent in order to take of a projection from eviction. However, in the same case, the tenant deposited rent in the Court for two/three months at a time. There were few defaults by the tenant in the sense that in respect of the first month to which the deposit related there was some delay amounting to two/three days and upto a maximum of 23 days but on the other hand the rent for most of the months was deposited in advance Hence it was held that the tenant had regularly deposited the rent.

CONCLUSION/FINDINGS:

5. I have considered the provisions of the Rent Act particularly Sections 12(3)(b) of the Act and the evidence on record, findings of the trial Court. I have also considered the findings of the appellate Court at Exh. 24 - application which was given during the pendency of the appeal and the order of this Court. I have considered the submissions made by the learned counsel for the petitioner and the evidence relied on by her. I have considered the judgements of this Court in the case of DAYALAL GANGARAM VS. BHIMANI BHUPATRAI CHUNILAL & ANR. (supra), PRAKASH SURYA VS. RASIKLAL ISHVERLAL MEHTA (supra), CHHOTUBHAI ZINABHAI VS. I.M. ATODARIA (supra), MOHAN LAXMAN HEDE VS. NOORMOHAMED ADAM SHAIKH (supra) which have been relied on by the learned advocate. I have also considered provisions of Section 11 of the Act which has been heavily relied on by Mr. Shukla, learned counsel for the respondent. I have also considered the judgements SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra) as well as GANPAT LADHA VS. SASHIKANT VISHNU (supra), MRANALINI B. SHAH AND ANOTHER VS. BAPALAL MOHANLAL SHAH (supra), JOSHI BHURARAM DATTARAM VS. JIVIBAI D. MULCHAND (MRS.), JOSHI RATANSHI GOPALJI VS. NAROTTAM NARANJI MEHTA ORS.

(supra) and other submissions made by the learned counsel. It is no doubt true that originally the case was fallen under Section 12(3)(a) of the Act. The trial Court held that the tenant failed and neglected to fulfil the conditions of Section 12(3)(a) of the Act. The appellant Court has considered the alternative case and held that the tenant is not qualified for protection under Section 12(3)(b) of the Rent Act. In view of the dispute of the standard rent which has been only determined by the judgement of the trial Court and there was a dispute of education cess, in my view the learned appellate judge was right in considering the alternative claim under Section 12(3)(b) of the Act.

5.1 The decision of the Hon'ble Supreme Court in the case of MOHAN LAXMAN HEDE VS. NOORMOHAMED ADAM SHAIKH (supra) has no applicability to the facts and circumstances of the present case. In that case the table reproduced at page 1113 of the judgement is clearly indicative of the facts in the said case. Such table shows that there was hardly any default in payment of rent from June 1976 to December, 1986. The Hon'ble Supreme Court found that during the period between 29.1.1981 to 17.12.1985 the appellant has been depositing the rent in the Court for two/three months at a time. In respect of some months, there are undoubtedly a few defaults, in the sense that the deposits have been made a few days later than directed. Under these facts, looking to the delay of only a few days, the Hon'ble Supreme Court found that there was reasonable punctuality and therefore a decree of eviction was set aside.

5.2 There can be no hard and fast rules governing the said decision as to what is the exact or mathematical punctuality. It is a question of facts in each case. Therefore, this decision of the Hon'ble Supreme Court in the case of MOHAN LAXMAN HEDE VS. NOORMOHAMED ADAM SHAIKH (supra) turns on its own facts and can be hardly said to have any precedent value and is easily distinguishable.

5.3 In the present case it has been clearly held by both Courts below that the petitioner has committed default in payment of rent. The appellate Court held that the tenant was irregular in payment of rent during the pendency of the suit. Exh. 24 is the purshis given before the first appellate Court. In the said purshis, learned appellate Judge has found that after framing all the issues on 5.9.1977, there has been an extreme irregularity in payment of rent. The tenant has paid on 13.2.1978 i.e. 5 months after the issues and again on

6.10.1978 i.e. 8 months after the previous payment. Such irregularity deprives the tenant of the protection under Section 12(3)(b). Hence no interference is called for and in the interest of justice, the decree be confirmed. The appellate Court found that after framing all the issues on 5.9.1977 there has been an extreme irregularity in payment of rent. The tenant has paid rent on 13.2.1978 and therefore the petitioners were found to have committed default in payment of rent of September, October, November and December 1977 and January 1978. Thus the defendants have not paid up rent from March to September, 1978. In such a situation, the discretionary jurisdiction exercised by the learned District Judge and the finding of fact of irregularity in payment of rent is not liable to be disturbed or interfered with in exercise of revisional jurisdiction.

5.4 In view of the aforesaid decisions, it is crystal clear that in the instant case also, a decree for eviction is liable to be confirmed and concurrent findings of two Courts below are not liable to be interfered with in the exercise of revisional jurisdiction. The view of the first appellate Court is not manifestly perverse and in fact it is only possible view to take on the facts of the case.

5.5 It may be noted that Division Bench of this Court in the case of PRAVINCHANDRA SHAMALDAS PATEL & ORS. VS. SARASWATIBEN RANCHHODBHAI reported in 18 G.L.R. 8, has, in para 8 on page 20, held that the tenant would be bound to deposit regularly in the appellate Court standard rent as determined by the trial Court. In this case the appellate Court has observed that the tenant was irregular in payment and there is a question of fact and the learned counsel for the appellant has not been able to show how the learned Judge has committed mistake in arriving at the said finding. In view of the same, I am of the view that the discretion exercised by the learned Judge is on cogent and convincing reasons. I do not see any reason to interfere with the said order of the learned Judge. Therefore, the revision requires to be rejected.

5.6 In view of the Division Bench judgement of this Court in the case of PRAVINCHANDRA SHAMALDAS PATEL & ORS. VS. SARASWATIBEN RANCHHODBHAI (supra) the tenant has to pay standard rent regularly even during the pendency of the appeal. However, whether the tenant has paid the amount regularly during the pendency of the appeal that issue has not been there. Therefore, reliance placed by the learned counsel for the appellant on the said

decision has no relevance. The learned counsel for the petitioner has placed reliance on decision of this Court in the case of BAI REVABEN WD/O. SITARAM GANGARAM VS. SINDHI MEGHNATH ENSHIRAM (supra) has also no relevance.

5.7 As the tenant has not paid the amount regularly during the pendency of the appeal and Exh. 24 was filed during the pendency of the appeal and the appellate Court has passed order that the tenant was irregular in making payment. In view of this, the reliance placed on the decision of this Court in the case of PARSOTTAMDAS KHEMCHANDDAS PATEL VS. SMT. PRABHUTA PANCHOLI AND OTHERS (supra) by the appellant has no application.

5.8 I have also considered the judgement of the Hon'ble Apex Court particularly judgement in the case of SHAH DHANSUKHLAL CHHAGANLAL VS. DALICHAND VIRCHAND SHROFF (supra), GANPAT LADHA VS. SASHIKANT VISHNU (supra) and JOSHI BHURARAM DATTARAM VS. JIVIBAI D. MULCHAND (supra) which have been heavily relied on by the learned counsel for the respondents. It may be noted that in this case the tenant was in arrears of rent for 18 months from November 1972 to April 1974 and therefore the plaintiff had given notice to the tenant for arrears of rent. It may be noted that during the pendency of the appeal the landlord filed exh. 24 in which also it comes to the notice that the tenant was irregular in payment for certain amount and default was committed by him. Even after considering this plea, the learned appellate judge has held that the tenant was not regular in making the payment and decree under Section 12(3)(b) of the Act has been passed against the tenant.

5.9 It has been noted that the tenant has not filed any application for standard rent and the tenant has not deposited the rent regularly and therefore he was not entitled to protection under Section 12(3)(b) of the Act. For claiming protection under Section 12(3)(b) of the Act, conditions have been laid down which I have enumerated in para 3.8A in my judgement. It may be noted that in this case the issues have been framed on 5.9.1977. The learned trial judge passed judgement on 26.10.1978 and thereafter the tenant was obliged to pay rent regularly. As noticed earlier during the pendency of the proceedings Exh. 24 was filed and there also it was pointed out that the tenant was irregular in making payment and the Court has rejected the said application and there was irregularity of payment. Even the tenant is not regular till the decree is passed but in appeal also the tenant has not paid the rent regularly.

5.10 Unless the tenant pays rent regularly he is not entitled to protection under Section 12(3)(b) of the Act. As there is a concurrent finding of fact by the trial court as well as the appellate Court that the tenant is not entitled to protection under Section 12(3)(a) and Section 12(3)(b) of the Rent Act, the petitioner has not been able to show that the said decision is contrary to law and facts whereas the learned counsel for the respondents relying on several judgements has been able to show that the reasoning given by the learned appellate judge is valid and correct both on facts as well as in law. The grounds given by the learned appellate judge is cogent and convincing and therefore this Court is not prepared to interfere in the Revisional Jurisdiction conferred under Section 29 of the Rent Act.

5.11 The decision in the case of PARSOTTAMDAS KHEMCHANDDAS PATEL VS. SMT. PRABHUTA PANCHOLI & ORS. reported in 1983 GLH (U.J.) 71 does not help the case of the petitioners. The lower Appellate Court has clearly found as a matter of fact that there were substantial irregularities in payment of rent during the pendency of the suit. There were no advance payments made by the petitioners to the respondents during the pendency of the suit. Therefore, the decision relied on by the petitioners is not helpful to the petitioners on facts.

5.12 The other decision relied on by the petitioenrs in the case of PRAVINCHANDRA SHAMALDAS PATEL AND ORS. VS. SARASWATI RANCHHODBHAI reported in 18 GLR 8 does not help the petitioners because it merely lays down that the term regularly is not mandatory but directory. Subject to the aforesaid, the case itself says that whether payment is regular or not is to be decided on the peculiar facts of each case. In the present case, the lower Appellate Court has clearly held that the petitioners are irregular in payment of rent. Such irregularity is substantial and not merely technical or insignificant. Such finding/conclusion of fact by the lower Appellate Court based on documentary evidence is not open to interference in exercise of revisional jurisdiction. Moreover, apart from laying down such preposition, the Division Bench merely sent back the matters before the single Judge of this Court for decision in accordance with law.

5.13 The respondents have relied upon to sustain the judgement of lower Appellate Court on the ground that the petitioners tenants have been guilty of substantial defaults in payment of rent and such irregular payment of

rent found as a matter of fact by the lower Appellate Court is not liable to be interfered with in exercise of revisional jurisdiction. The view taken by the lower Appellate Court is reasonable and possible view on the appreciation of evidences. It would not be appropriate to substitute the views of this Court in place of the view of the lower Appellate Court because it tantamounts to re-appreciation of evidence which cannot be done in exercise of revisional jurisdiction.

5.14 The tenant has not been able to show that the finding of the appellate Court is perverse or contrary to law and settled principles. Relying on the judgement of the Hon'ble Supreme Court as well as the High Court and now there are judgements of this Court in which similar principles have been laid down, the Revision Application is required to be rejected. Hence the Revision Application is rejected. Rule discharged. No order as to costs. Interim relief granted earlier is vacated.

(K.M. MEHTA, J)
(pkn)